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SUPREME COURT, U. S.

No. 71-427

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSEPH BACKUS, JOSEPH BACKUS IMPORTS, LTD.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71–428

JOHN BACALL, JOHN BACALL IMPORTS, LTD.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Central District of California, petitioners were convicted on four counts of having understated, at different times, the cost of imported fabrics on customs invoices, in violation of 18 U.S.C. 542. Petitioner Bacall was sentenced to consecutive prison terms of two years on each count and fined a total of $20,000. Petitioner John Bacall Imports, Ltd., a corporation owned by petitioner Bacall, was fined a total of $20,000. The court of appeals reversed petitioners' convictions on one count, finding insufficient evidence, but affirmed their convictions on the three remaining counts (Pet. App. 1; 443 F. 2d 1050).

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The relevant facts are set forth in some detail in the opinion below (Pet. App. I, 2–6). In brief, they show that for a number of years, including the period 1963 to 1966, petitioner Bacall was engaged in importing fabrics into the United States which he purchased from suppliers while on yearly European buying trips. The customs duty on each shipment consigned to petitioner depended upon the cost and description of the fabrics; this information was shown on the invoices from the foreign suppliers, which were provided to Customs officials by petitioner.

In 1966, a Customs commodity specialist, who had reclassified an earlier Bacall shipment, questioned the composition (wool, silk, etc.) of fabrics contained in two shipments consigned to petitioner. He took samples from each shipment before releasing it to petitioner Bacall. Laboratory tests confirmed that the sample fabric was not of the composition claimed by petitioner, and, in October 1966, the matter was referred to the Customs Agency Service to determine whether there was any fraudulent intent (Tr. 28–43).[2]

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[1] In 1965 the specialist had suspicions regarding petitioners' description of fabrics as "job lots" or "close outs" (cloth purchased at discount) and had reclassified the shipment, assessing additional duty (Tr. 36). In addition the record (Tr. 12–14) and investigation reports in this case indicate that at the time the 1966 shipments arrived in the United States a parallel investigation was being conducted by the Federal Trade Commission. Commission officials had determined that there was a variance in the labeling of petitioners' fabrics in interstate commerce and the description given of the same fabrics as they arived in foreign commerce.

[2] "Tr." references are to the transcript of proceedings in the trial court, both volumes of which are being lodged with the Clerk of this Court.

The Service, having determined that the misdescribed fabrics from the two 1966 shipments had been commingled with fabrics from earlier shipments, seized, without a warrant, petitioners' entire warehouse stock in November 1966. An analysis of the seized fabrics also showed that the composition of the material had been improperly described in the invoices. As a result, petitioner had been able to import the merchandise for substantially less duty than he should have paid.

In January 1967, Customs requested that French authorities undertake an investigation into petitioner Bacall's dealings with known foreign suppliers. Set forth in the request was the evidence obtained to that point regarding possible violations (misdescription) of the United States Customs laws, and the existing suspicion that certain fabrics had been improperly described as purchased at discount, *i.e.*, as "job lot" or "close out" items (n. 1, *supra*). Investigation by a French customs official subsequently revealed that petitioner had consistently solicited, and in many instances had obtained, from his foreign suppliers invoices which misdescribed the fabrics later imported by petitioner. In addition, the official obtained from one supplier, Blech Freres, who was known to have dealt with petitioner for a number of years, evidence in the form of correspondence which indicated that, during the period 1963 through 1966, petitioner Bacall had been understating the true cost of Blech fabrics. Cashiers checks referred to in the correspondence, which had been purchased by petitioner from United

States banks and forwarded to Blech, were obtained and ultimately used in this prosecution to show that petitioner had been knowingly understating the cost of Blech fabrics.[3]

Petitioners contend here, as below, that their convictions were based upon tainted evidence. They argue that the seizure of fabrics in Bacall's warehouse, which the court below had held to be illegal in an appeal from a separate forfeiture action,[4] precipitated the foreign investigation which led to discovery of the evidence used to convict—namely, the correspondence and cashiers checks showing the true cost to petitioners of Blech fabrics. In rejecting this attack upon the convictions, the court of appeals initially noted

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[3] The earlier analysis of Blech fabrics by United States customs had shown the fabrics to be as described by petitioner. Nor had affirmative evidence been obtained to indicate that the cost of Blech fabrics was being understated. The French official who checked with Blech Freres discovered, however, that Freres had supplied petitioner with separate invoices to cover the cost of the special finishing and processing of the raw fabrics. Petitioner Bacall's documentation of the cost of Blech fabrics during those years reflected only the cost of the unfinished fabrics.

[4] After the foreign investigation the government sought to perfect its seizure in a forfeiture action. The corporate petitioner then commenced an action to replevin the seized fabric and the actions were consolidated for trial. The district court ruled that the seizure was illegal and ordered replevin, 287 F. Supp. 916. On appeal, the court below concurred in the view that the seizure was illegal. However, it noted that the mere fact of an illegal seizure did not immunize the stock from forfeiture. The court pointed out that there was evidence obtained independent of the seizure which would support forfeiture and it remanded the case to the district court for a determination as to what fabrics contained in the seized stock were subject to forfeiture (Pet. App. II, p. 4).

that the fact that the incriminating evidence had come to light following admittedly illegal government conduct did not automatically render the evidence illegal. Relying upon *Wong Sun* v. *United States*, 371 U.S. 471, 487–488, the Court, after an exhaustive analysis of the circumstances, determined that in this case there had been no such exploitation of the illegal seizure as to warrant reversal.[5] Petitioners' various contentions before this Court were fully considered and properly rejected in the opinion of the court below, on which we rely here.[6]

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[5] The court assumed *arguendo* that, "but for" the seizure, the foreign investigation would not have ensued. In view of the evidence existing prior to the seizure, however, which strongly suggested that petitioner Bacall was engaged in a fraudulent scheme to avoid customs duties by misdescription, we think it likely the investigation would have been undertaken even if the illegal search had not been made. Thus, the customs agent testified that when he was assigned the case on October 27, 1966, he formulated the intent to request a foreign investigation. But, due to the subsequent search and seizure on November 4th and 10th, he deemed that "it would be inadvisable to send a request over without waiting to see what possibly the inventory of the merchandise would reveal" (Tr. 166). The official written request for a foreign investigation was made on January 9, 1967.

[6] It is suggested that the court below ignored the implicit finding of the trier of facts (Tr. 286–288) that the evidence was tainted, notwithstanding his denial of the motion to suppress on the ground that a finding of no taint was mandated by the court of appeals remand in the earlier forfeiture case (Pet. App. II, pp. 3–4). The point is not well taken, however. The court below, while finding it unnecessary to reach the question whether the "trial judge erred in believing himself 'mandated' by [the earlier] decision in the forfeiture cases" (Pet. App. I, p. 7), dealt fully with his implicit finding of taint

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

(Pet. App. I, pp. 15–16). It simply disagreed with the trial judge's conclusion that "the government had failed to carry its burden of proving that the subject evidence was of sufficiently independent origin as to remove the taint" (Pet. 7).

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